Supreme Court, U.S.
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No. 99-1480

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada Corporation,
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Does tying by the dominant carrier of its common carrier transport services tariffed under 47 U.S.C. Section 203, to its non-tariffed services, while at the same time tying those non-tariffed services back to its tariffed services violate the antitrust laws, 15 U.S.C. Sections 1 and 2?

AT&T states the Question Presented for Review as follows:

> "Whether MRO Communications, Inc. ("MRO") properly stated an antitrust tying claim where MRO failed to allege that AT&T Corp. ("AT&T") had any appreciable market power in the alleged tying product market to force MRO to accept the purported tying arrangement, and where MRO failed to allege the existence of any anticompetitive effects in any relevant market as a result of the purported tying arrangement?"

This reply brief will show that AT&T reaches this question only by misstating the record.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

REASONS FOR GRANTING THE WRIT 1

I. AT&T INCORRECTLY ASSERTS THAT THERE IS "VIGOROUS" OR "ROBUST" COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY AND IS OTHERWISE IN ERROR. 1

II. THERE IS CAUSE FOR ALARM: UNLESS THE COURT STEPS IN AT&T WILL CONTINUE ITS ILLEGAL PRACTICES 5

III. *EASTMAN KODAK CO. V. IMAGE TECHNICAL SERVICES*, 504 U.S. 451, 112 S.Ct.2072 (1992) APPLIES 6

IV. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF ANTITRUST LAW CONTRARY TO *EASTMAN KODAK V. IMAGE TECHNICAL SERVICES*, 504 U.S. 451, 112 S.Ct. 2072 (1992) AND DECISIONS OF THE COURTS OF APPEALS OF THE FIRST AND THIRD CIRCUITS 7

V. THE POSITION OF THE FEDERAL COMMUNICATIONS COMMISSION 9

CONCLUSION 10

TABLE OF CITED AUTHORITIES

CASES: **Page(s)**

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99 (1957) 2

Eastman Kodak v. Image Technical Services,
504 U.S. 451, 112 S.Ct. 2072 (1992) 5, 7

Grappone, Inc. v. Subaru of New England, Inc.,
858 F.2d 792 (1st Cir. 1988) 8

In re Dial-It 900 Servs. and Third Party Billing and Collection Servs.,
4 F.C.C. Rcd. 3429, 1989 WL 512717
(F.C.C. Apr. 12, 1989) 9, 10

In re Paul Ondulich v. AT&T Communications, Inc.,
5 F.C.C. Rcd. No. 11 (1990) 9

International Salt v. United States,
332 U.S. 392, 68 S.Ct. 12 (1947) 2, 7

Northern Pacific Railway v. United States,
356 U.S. 1, 78 S.Ct. 514 (1958) 2, 7

Town Sound and Custom Tops v. Chrysler Motors,
959 F.2d 468 (3rd Cir. 1992) 8

United States v. Radio Corporation of America,
358 U.S. 334, 79 S.Ct. 457 (1959) 10

STATUTES:

47 U.S.C. Section 201(b) 6

47 U.S.C. Section 202(a) 6

FEDERAL RULES:

Fed.R.Civ.P.. 12(c) 4

REASONS FOR GRANTING THE WRIT

I. AT&T INCORRECTLY ASSERTS THAT THERE IS "VIGOROUS" OR "ROBUST" COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY AND IS OTHERWISE IN ERROR.

Like the Court of Appeals, AT&T misstates MRO's averments in its Complaint relating to MCI and Sprint. The actual averments are (Pet. 41a, and 45a-46a):

> 17. MRO is informed and believes, and on that basis alleges, that AT&T was aware that MCI and Sprint Communications had made MRO offers to provide similar 900-number billing and collection services that were sufficiently definite to be capable of acceptance.
>
> 18. Among the reasons MRO entered into the MRO BSA with AT&T, and rejected the offers of MCI and Sprint, was MRO's reliance upon AT&T's representations that AT&T 900-number service would provide a lower rate of chargebacks and uncollectibles and would provide more accurate, effective and efficient billing and collection services than would MCI and Sprint Communications.
>
> 27. Even though other companies such as MCI and Sprint from 1989 also provided tariffed transport services for 900 numbers there was no competition for such services for any particular 900 telephone number because AT&T and other carriers did not permit the portability of 900 telephone numbers from one carrier to another. Had 900 numbers been portable (or had AT&T not inextricably linked its provision of billing services for particular 900 telephone numbers to AT&T's provision of tariffed transport services for such 900 telephone numbers), the cost of 900 tariffed transport services (or of 900 billing Services) would have been reduced by at least 10% to MRO.

AT&T's construction of these averments to mean that there is "vigorous competition" (AT&T Br. 7) or a "robust competitive market" (AT&T Br. 7) defies imagination. MRO's averment of lack of portability and the averment of tying of tariffed services also belie AT&T's denial of barriers to entry in the tariffed services market (AT&T Br. 16). MRO also averred the imposition of onerous tying and other conditions which would not have existed in a competitive market (Pet. 43a, pars. 22, 23; Pet. Ct. App. Mem. 8a-10a).

Regardless, at least where there is express tying, the existence of competitive products is irrelevant. As this Court said in *Northern Pacific Railway v. United States*, 356 U.S. 1, 10, n.8, 78 S.Ct. 514 (1958):

> As a matter of fact, the defendant in *International Salt* [332 U.S. 392, 394, 68 S.Ct. 12, 14 (1947)] offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant.

MRO should be permitted to prove its antitrust claims under these averments, *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99 (1957).

AT&T erroneously asserts (AT&T Br. 6):

> This case involves AT&T's decision to protect its public image by disassociating its non-tariffed billing services from a customer, MRO, that used sexually graphic advertising to promote its programs on AT&T's 900 numbers.

AT&T makes no record reference for this assertion, nor for the entire paragraph which follows. The "sex" record is (Pet. 47a-49a, par. 32):

> 32. Commencing in 1991 AT&T on many occasions terminated billing and collection services (as well as AT&T's linked tariffed transport services) on numerous MRO 900 telephone

numbers on the alleged grounds that (i) "the advertising for these lines contained implicit and explicit sexual references", and/or (ii) AT&T's Guidelines were allegedly violated. Such terminations breached the MRO BSA and/or violated the Federal Communications Act for the following reasons:

First, frequently the allegedly objectionable advertising did not even refer to AT&T's 900 numbers; instead it referred to other telephone numbers, which were not AT&T 900 programs.

Second, frequently the allegedly objectionable advertising was neither "sexually explicit or implicit" . . .

Fourth, frequently AT&T's termination letters to MRO referred to AT&T's Guidelines as justification for AT&T's refusal to provide billing and collections services (and tariffed transport services on MRO's 900 telephone numbers) because of advertising allegedly containing "implicit or explicit sexual references". In fact, what AT&T's Guidelines prohibited were ". . . explicit or implicit *descriptions* of violence or sexual conduct. . ." (Emphasis added.). . .

Sixth, AT&T specifically and frequently approved advertising for AT&T 900 numbers that was sexually implicit or explicit. For example, AT&T approved advertising that was explicitly directed to, and used the word, "swingers". The word "swingers" refers to people who are seeking sexual liaisons. AT&T also approved advertising for AT&T 900 numbers, which included phrases such as "Share Women's most secret desires! Totally Uninhibited Fantasies & Confessions." AT&T also specifically approved advertising for AT&T 900 numbers, which included phrases such as "Contact

> Swingers . . . Single Girls and Couples - Lifestyles - Mild to Wild!"

The specific description of MRO's business is (Pet. 38a. par. 10):

> 10. MRO acts as a service bureau, offering to telephone information service providers ("IP's") both AT&T "900 tariffed transport services" and the associated AT&T billing and collection services that are the keystone of the IPs' 900 pay-per-call businesses. MRO also acts as an IP itself. The term "900 tariffed services" refers to AT&T's basic utility or telecommunications services which provides for AT&T's transmission of the 900 telephone call from the caller's telephone to MRO's facility in Las Vegas, Nevada. Pursuant to AT&T's associated 900 billing and collection services the calling party is charged for each call made to each of MRO's 900 telephone numbers at a rate selected by MRO, which is different from the rate the caller would be charged for making an ordinary long-distance call. This additional charge is for the access to the information provided by MRO, or other IP. Examples of such pay-per-call services include sports scores, computer dating "bulletin boards", stock market quotes, weather data, etc.

If AT&T had desired to dispute the averments of MRO's First Supplemental and Amended Complaint, they could have filed a motion for summary judgment. This they didn't do. This is an appeal from a judgment on the pleadings.

AT&T asserts (AT&T Br. 15):

> There simply is nothing that warrants revisiting the factual basis for dismissing MRO's misguided antitrust allegations. (*See also*, AT&T Br. 19)

But no factual inquiry was required – or permitted – in this case because MRO's antitrust Claims were dismissed on the pleadings. (Fed.R.Civ.Pro. 12(c); (Pet. 22a-24a).

II. THERE IS CAUSE FOR ALARM: UNLESS THIS COURT STEPS IN, AT&T WILL CONTINUE ITS ILLEGAL PRACTICES.

AT&T correctly asserts that the unpublished Memorandum of the Court of Appeals has no precedential effect. AT&T therefore concludes: "there is no cause for alarm" (AT&T Br. 9, n.2).

But it is clear that the tying practices MRO complains of are used by AT&T in all its service agreements with other customers (Pet. 44a, par. 24). AT&T is the dominant player in the industry (Pet. 46a, par. 29). AT&T continues to assert that under AT&T's definition of the market, its ties are legal. It is not a case of "nipping in bud"; AT&T's violations are in full flower.

III. *EASTMAN KODAK CO. V. IMAGE TECHNICAL SERVICES*, 504 U.S. 451, 112 S.Ct. 2072 (1992) APPLIES.

AT&T can not deny it is averred to be the predominant player in the market with a 50% market share of billing services and tariffed services (Pet. 46a, par. 29) whose practices increase prices by 10% (Pet. 45a-46a, par. 27). Under *Eastman Kodak* this is sufficient for the Court to infer market power, 504 U.S. 464, 112 S.Ct. 2081.

As to the aftermarket for tariffed services, AT&T attempts to distinguish *Eastman Kodak* on the ground that Kodak imposed the tie *after* its customers had purchased copiers, while AT&T expressly set forth its tying policy in its BSA (AT&T Br. 13). Assuming this distinction to be valid legally, it doesn't apply to AT&T because AT&T's policy of terminating 900 numbers upon termination of services is expressly averred by MRO to take place *after* the execution of the BSA and to be contrary to the BSA. MRO avers (Pet. 43a, par. 23):

> 23. Even though Section 9 of MRO's BSA is expressly applicable only "upon termination of this Agreement", AT&T applied it whenever any particular 900 program under the MRO BSA was terminated, even though the MRO BSA itself was not terminated as required by the BSA. Thus upon

> AT&T's termination of *any program* under the MRO BSA, AT&T refused to permit MRO to keep the same 900 telephone number(s) in order for MRO to continue to receive tariffed transport services on such 900 telephone number(s). AT&T refused to continue to provide tariffed transport services for MRO after AT&T's billing services for a particular MRO 900 telephone number was terminated, unless AT&T assigned a new 900 telephone number. Since the callers of such 900 telephone numbers were used to calling the existing MRO 900 telephone numbers, this AT&T practice destroyed the value of MRO's and the IP's interests in such 900 telephone numbers.

Thus, AT&T is wrong to state (AT&T Br. 13):

> Unlike Kodak, the alleged tie here was created upon entering the contract, not *after* the contract already was signed and being performed.

Curiously, AT&T asserts (AT&T Br. 7):

> MRO never advanced any arguments below that a valid tying claim could be stated based on the regulated/non-regulated nature of the alleged products.

and then states that MRO's argument is "ludicrous." That the Court of Appeals was well aware of the "regulated/non-regulated nature of the alleged products" is demonstrated by its discussion of the Federal Communications Commission's decision (Pet. 17a).

As to the "ludicrous" claim, AT&T again belies its own position by blatantly asserting that billing services and tariffed services are one market because AT&T's non-tariffed BSA clearly announces the conditions pursuant to which *tariffed* services will be terminated (AT&T Br. 13-14). This only serves to confirm MRO's position that the tie is being used by AT&T to avoid the provisions of the 47 U.S.C. Sections 201(b) and 202(a); (Pet. 15-16).

As an aside, we would point out that the prior announcement of a tying policy in a defendant's contract is not a defense to an illegal tie. *Cf. Northern Pacific Railway v. United States*, 356 U.S. 1, 3, 78 S.Ct. 514, 517 (1958); *International Salt v. United States*, 332 U.S. 392, 394, 68 S.Ct.12, 14 (1947).

IV. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF ANTITRUST LAW CONTRARY TO *EASTMAN KODAK V. IMAGE TECHNICAL SERVICES*, 504 U.S. 451, 112 S.Ct. 2072 (1992) AND DECISIONS OF THE COURTS OF APPEALS OF THE FIRST AND THIRD CIRCUITS.

We have previously demonstrated the application of *Eastman Kodak*. AT&T contends (AT&T Br. 16):

> The Ninth Circuit based its decision on the fact that MRO failed not only to allege any appreciable market power, but also failed to allege any anticompetitive effect on competition that would be actionable under either the *per se* or the "rule of reason" tests. The Ninth Circuit correctly found that MRO admitted that it received viable bids for the services at issue from AT&T, MCI, and Sprint, but simply chose to contract with AT&T. (See Pet. App. at 5a.) Not only did MRO admit that there was no "forcing" present and that a robust competitive market was at work, but it also conceded that despite the presence of the purported "tying" arrangement, MRO was able to extract a 20 percent discount off of AT&T's fees. (App. at 7a par. 60). Moreover, MRO made no allegations of any barriers to entry or the inability of AT&T's rivals to expand in the relevant markets. (Pet. App. at 4a-5a.)

How offers from MCI and Sprint that MRO's Complaint avers are "sufficiently definite to be capable of acceptance" *ipso facto* become "viable bids" is not explained. MRO's Petition correctly states (Pet. 14, n.6):

> The Ninth Circuit's Memorandum (App. A at 5a-6a) relies upon cases "rejecting the theory that a good reputation for providing high quality service, without more, confers market power." But MRO pled much more. MRO's FASC pled that AT&T not only had approximately 50% of both markets (App. E, par. 29 at 46a) but that AT&T represented to MRO that AT&T's rate of uncollectibles and chargebacks was lower than that of MCI and Sprint, and that AT&T had more accurate, effective and efficient billing and collection services (App. E, pars. 13, 18 at 39a, 41a). These are allegations of fact, not allegations of reputation. MRO's FASC also averred AT&T's insertion of very onerous tying conditions in its BSA, which would not have survived in a competitive market (App. F, pars. 22-24 at 43a-44a); See also the Ninth Circuit's reference in their Memorandum (App. A at 9a-10a) to AT&T's damage disclaimer.

The anticompetitive effects of price increases (Pet. 45a-45b, par. 27); AT&T's exclusion of competitors by changing a 900 number whenever its customer desires to use a competitive billing services provider (Pet. 44a, pars, 24, 25); AT&T's dominant market share (Pet. 46a, par. 29); the termination of tariffed services for reasons not found in the tariff (Pet. 47a-50a, pars. 32, 33), are not out weighed by any benefit to AT&T. *Cf. Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 800 (1st Cir. 1988). AT&T's assertion that "This case involves AT&T's decision to protect its public image by disassociating its non-tariffed billing services from a customer, MRO, that used sexually graphic advertising to promote its programs on AT&T's numbers," is contrary to the record (Pet. 47a-50a, pars. 32, 33). It cannot be used to justify AT&T's anticompetitive acts; therefore those acts are an unreasonable restraint of trade; *Town Sound and Custom Tops v. Chrysler Motors*, 959 F.2d 468, 483-84 (3rd Cir. 1992). Thus, if the averments of MRO's Complaint are fairly stated, a situation exists in which the First and Third Circuits would have found ties constituting unreasonable restraints of trade.

V. THE POSITION OF THE FEDERAL COMMUNICATIONS COMMISSION.

AT&T asserts that decisions of the Federal Communications Commission permit the tying of tariffed and non-tariffed services (AT&T Br. 8). The seminal authority appears to be *In re Dial-It 900 Servs. and Third Party Billing and Collection Servs.*, 4 F.C.C. Rcd. 3429, 1989 WL 512717 (F.C.C. Apr. 12, 1989). MRO's Petition shows that in that case the FCC was *not* dealing with ties between 900 billing services and 900 tariffed services (Pet. 16, n.8). More specifically, in *Dial-It, supra*, the FCC stated in relevant part in paragraph 25 at 3432:

> AT&T asserts that sponsor subscribers are *not* required to take Premium Billing as a concomitant to tariffed Dial-it 900 services and indeed, tariffed service subscribers are *not* "entitled" to receive Premium Billing service. *Instead, they are separate services*. (Emphasis added.)

Likewise, the FCC's *Audio Communications* decision referred to by AT&T (Br. 8), was also based on the fact that there was no tie between 900 billing services and 900 tariffed services. When Sprint ceased providing billing services for a particular 900 number, they continued to provide transport services for that 900 number. Or as the FCC stated in par. 6 of its decision:

> Sprint Telemedia continues to offer 900 transmission service on a common carrier basis, but without billing and collection *for all interested IP's*. (Emphasis added.)

In other words, Sprint did not "tie" its 900 billing services to its 900 transport services for particular 900 number. In this Case (unlike the *Dial-It* and *Audio Communications* cases[1]), AT&T's 900 Billing

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[1] The decision *In re Paul Ondulich v. AT&T Communications, Inc.*, 5 F.C.C. Rcd. No. 11 (1990) referred to by AT&T (Br. 8) is also distinguishable because there was no tie in that case between a regulated service and an unregulated service; inasmuch as the 900 service there was an unregulated Call Count service, *not a regulated communication*

Services are inextricably "tied" to AT&T's 900 transport services for the same 900 numbers. In fact, the FCC's opposition to any such tying practices is set forth in the Petition (Pet. 11, n.5).

Because on the tying issue the FCC was not exercising primary jurisdiction, it did not grant antitrust immunity; *United States v. Radio Corporation of America*, 358 U.S. 334, 350-351, 79 S.Ct. 457, 466-67 (1959).

Perhaps the FCC should be invited to file an *amicus curiae* brief in this action.

CONCLUSION

It is clear from AT&T's position that its tying practices will continue unless this Court acts. Both of the lower courts found that non-regulated services are tied to regulated services by AT&T (Pet. 25a, 5a). AT&T asserts that the after market in tariffed services is not implicated because "MRO knew before it entered into the BSA that AT&T sold its billing [unregulated] and tariffed transport [regulated] services together. . ." (AT&T Br. 14). Even though the Memorandum of the Court of Appeals can't be relied on for precedent, the communications industry will know that the dominant competitor is getting away with tying.

Dated: April 14, 2000.

Respectfully submitted,

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service. Indeed, the F.C.C.'s decision in *Dial-It* expressly distinguishes Call Count service from the information services presented in the case at bar. "A Call Count service sponsor / subscriber does not seek a transmission path from AT&T in order to provide, *e.g.*, an information service to his customers. Rather, the Call Count sponsor / subscriber obtains that service only in order to obtain substantive information from AT&T, for example, how many callers have vote 'yes' or 'no' ". *Dial-It*, 4 F.C.C. Rcd. No. 9 at 3431.